In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 965

CARL DEAN COTHREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a trial to the court in the United States District Court for the Middle District of North Carolina, petitioner was convicted on two counts charging the unlawful possession and concealment of non-tax-paid liquor (26 U.S.C. 5604(a), 5601(a)(12)). On May 16, 1967, he was sentenced to three years' imprisonment on count 1 (concealment), and to five years' probation on count 2, to commence upon the expiration of the prison term. On November 7, 1967, the court of appeals affirmed (Pet. App. I). The petition for a writ of certiorari was filed on December 26, 1967, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no occasion

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for further review of the question advanced, considered, and rejected in the courts below.

The evidence showed that at 4:30 a.m. on October 26, 1966, two agents of the Alcohol and Tobacco Tax Unit, acting on "reliable information" that whiskey was stored in an unoccupied dwelling, commenced surveillance of it (Tr. 9, 18),[1] by stationing themselves in the woods about fifty-five steps from the house (Tr. 10, 24–25). At about 9:00 a.m., one of the agents moved to an area nearer the house where he detected the odor of distilled spirits emanating from the basement (Tr. 14, 18–19). At 3:00 p.m., a truck backed to the basement door, and petitioner and one Money emerged from the truck and went to the basement. They then loaded seemingly empty five-gallon cans from the basement onto the truck and drove off (Tr. 10–11). This process was repeated about two hours later by a lone man in a Mercury whom the agents could not identify (Tr. 11–12). At about 11:00 p.m. another car arrived and backed to the basement door. Petitioner and Money stepped out and, after opening the trunk, carried several plastic one-gallon jugs apparently containing liquid from the basement to the car. The agents then approached the car. As they neared the basement door they saw petitioner and Money in the basement. They waited at the door and, when the two men reached the threshold, they placed them under arrest (Tr. 12–14, 17–18, 30–31, 38). The jugs in the car were found to contain non-taxpaid whiskey. The agents also conducted a search of the

[1] "Tr." refers to the transcript of proceedings at trial, lodged with the Clerk of this Court.

basement, where they found additional gallons of non-taxpaid liquor (Tr. 15, 32–33). No other portion of the house was searched (Tr. 22, 35).

DISCUSSION

Petitioner contends that the seizure of the whiskey in the basement was unlawful because the agents could have obtained a warrant.[2] He argues that agents ought to be required to obtain a warrant before being allowed to make a nighttime search of a private dwelling. The search here, however, was only of the basement of unoccupied premises which petitioner and his co-defendant were observed to be using as a storehouse for illegal liquor. The activities taking place before the surveilling agents clearly furnished probable cause to believe that a felony was being committed in their presence.[3] A warrant is not a prerequisite to an immediate arrest in such circumstances. Thus, the courts below correctly found that the search of the basement was justified as reasonably incident to a lawful arrest. See *United States* v. *Rabinowitz,* 339 U.S. 56; *United States* v. *Young,* 322 F. 2d 443 (C.A. 4). Nor is *Jones* v. *United States,* 357 U.S. 493, relied upon by petitioner, to the contrary. The court there held that

[2] The agents had no car but possessed a radio by which they could have reached other agents (Tr. 19–20, 35). A United States Commissioner was apparently available in a town some twenty miles away (Tr. 19).

[3] The fact, alluded to by petitioner (Pet. 5), that the agents conducted their surveillance from woods on petitioner's land did not violate any rights of petitioner. See *Hester* v. *United States,* 265 U.S. 57, 59; *United States* v. *Sorce,* 325 F. 2d 84 (C.A. 7), certiorari denied, 376 U.S. 931.

federal agents may not enter a private dwelling at night, without a warrant authorizing a nighttime search, on probable cause to believe that the house contained contraband materials.[4] The Court specifically distinguished and approved *Rabinowitz* as sustaining a warrantless search of premises where the search, as here, was predicated upon "an initial valid arrest". *Jones* v. *United States, supra,* 357 U.S. at 499.

Moreover, the evidence on the motion to suppress was heard along with the evidence in chief in this non-jury case. The district court noted that, as the trier of fact, it would find petitioner guilty without regard to the whiskey seized in the basement since the observations of the agent and the illicit whiskey found in the car were sufficient to establish guilt (Tr. 64).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Unlike the situation in this case, the house in *Jones* was occupied and the entry was forcible.

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